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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-6751

E. CHRISTMAN DAWN, individually and doing business as THE GAME COMPANY, *Petitioner,*

vs.

STERLING DRUG, INC., and DANCER-FITZGERALD-SAMPLE, INC., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents Sterling Drug, Inc. and Dancer-Fitzgerald-Sample, Inc. herewith oppose the Petition for Writ of Certiorari.

Jurisdiction.

Respondents disagree with the Petitioner on the jurisdiction of this Court to decide any of the questions presented by Petitioner. Petitioner raises only questions involving substantive law and practice of the State of California. Petitioner's attempt to base a claim of right, privilege or immunity under the Constitution of the United States is wholly specious. Neither 28 U.S.C. § 1257(3) nor any other statute provides this Court with jurisdiction to decide issues of California substantive law or practice.

Statement of the Case.

The subject of the case is the phrase "Tower of Babble." Petitioner manufactures and sells an educational language game under the name "Tower of Babble." Petitioner allegedly registered the name "Tower of Babble" with the United States Patent Office in 1962 and with the Secretary of State of California in 1968 as a trademark for "Equipment sold as a unit for playing an educational language game." Respondent, Sterling Drug, Inc. (hereafter "Sterling") manufactures a diversity of products, including Bayer Aspirin. Respondent, Dancer-Fitzgerald-Sample, Inc. (hereafter "Dancer") is an advertising agency employed by Sterling, and as part of its promotion for the sale of Bayer Aspirin it created a certain print advertisement wherein the phrase "Tower of Babble" appeared as a descriptive caption.

The Bayer Aspirin advertisement depicted a stack of assorted pills and headache remedies with the caption "Tower of Babble" beside the stack. Below that appeared a text which stated:

> "Confused by claims? by shapes and sizes? by strange-sounding ingredients? When you need fast relief from headache pain, don't forget this fact: Bayer (R) is 100% aspirin. And aspirin is the strongest pain reliever you can buy. No wonder Bayer works wonders."

Petitioner brought this action in the Superior Court of the State of California for the County of Los Angeles. The Complaint alleges fourteen overlapping causes of action. The basic contention raised by Petitioner, and the only substantive question that he brings to this Court, is that he has the sole and exclusive right to use

the words "Tower of Babble" and that no one else can use those words in any context or in any way without invading his "property right." Respondents moved for summary judgment in the trial court setting forth the undisputed facts and circumstances surrounding the Bayer Aspirin advertisement.

The record before the Court of Appeal for the State of California discloses the undisputed facts that in moving for summary judgment, Respondents used and relied upon Appellant's signed, sworn deposition. The deposition was lodged with the Court prior to the hearing on Respondent's motion for summary judgment and filed the day thereof. Several months thereafter, the same Court considered a rehearing of that motion and still had before it the signed transcript of Petitioner's deposition.

Petitioner's main substantive response to the motion for summary judgment was to present facts showing the registration of his trademark. Petitioner contended that summary judgment should not be granted because of his property right in the words. The trial court agreed with Respondents that California law provides trademark protection from confusing trademark uses but provides no blanket protection of "property rights" in ordinary words used in the English language. Petitioner has never contended in this litigation that any confusion or possible confusion arises from the Bayer Aspirin advertisement.

Petitioner appealed the granting of summary judgment in favor of Respondents. On appeal, Petitioner contended that the Court improperly considered his sworn, signed deposition because California practice requires a moving party to present his factual showing by affidavit. Petitioner argued in the alternative that

the Court improperly considered his deposition because the deposition was merely lodged with the Court and not formally filed until the day of the hearing. Finally, Petitioner argued that the Court improperly ignored facts concerning his claimed property right in ordinary words. The California Court of Appeals rejected each procedural point raised by Petitioner, characterizing them as "frivolous," and also rejected the single substantive issue which is involved in this Petition. In effect, the Court of Appeals held:

a. That a sworn, signed deposition is the same as an affidavit for purposes of California practice requiring a factual showing before granting summary judgment. This holding is supported by identical decisions in other reported California cases;

b. That it is sufficient, for purposes of California practice, to lodge a deposition with the trial court, the essential issue being whether it is available to the trial court; and

c. That mere ownership of a trademark is irrelevant without the requisite elements of trademark infringement or unfair competition which are the only causes of action for damages based on a trademark.

Another point decided by the Court of Appeals concerns the theory of trademark dilution. Inasmuch as the Court of Appeals reversed summary judgment on that point, Petitioner omits the issue from his Petition.

REASONS FOR DENYING THE WRIT.

Petitioner first complains about the procedure used by the trial court in granting summary judgment. The California Court of Appeals termed this contention "frivolous" and then proceeded to demolish the contention on the basis of settled California law of procedure. Were this present Petition before the California Supreme Court, there would be jurisdiction to quarrel over whether the Court of Appeals correctly interpreted California procedure. But this being a federal court, there is no jurisdiction to review decisions of the California Courts on matters of procedure under California law.

United States v. Pink (1942), 315 U.S. 203, 86 L.ed. 796, 62 S.Ct. 552;

Milk Wagon Drivers Union v. Meadowmoor Dairies (1940), 312 U.S. 287, 296, 85 L.ed. 836, 843;

Chicago Life Ins. Co. v. Cherry (1917), 244 U.S. 25, 30; 61 L.ed. 966, 969; 37 S.Ct. 492.

Petitioner secondly complains that the California Courts have disregarded his factual presentation asserting ownership of the words "Tower of Babble." Petitioner's characterization of how the California Court treated his offer of fact is incorrect. The California Courts clearly and consistently held that as a matter of California substantive law, no property right is given the owner of a trademark whereby he may prevent "trespass" upon the words except insofar as a remedy exists for trademark infringement or trademark dilution. As to trademark infringement, the California Courts noted that Petitioner neither alleged confusion nor offered

evidence of confusion. The Courts noted also the total lack of any possible confusion. Based on this state of the record and facts, the California Courts have held as a matter of California substantive law that Petitioner has no claim for damages arising from Respondent's conduct. Again, this Court lacks jurisdiction to review decisions of the California Courts or matters of California substantive law.

Kryger v. Wilson (1916), 242 U.S. 171, 176; 61 L.ed. 229, 232;

Scripto, Inc. v. Carson (1960), 362 U.S. 207, 210. 4 L.ed.2d 660, 663; 80 S.Ct. 619.

Conclusion.

Inasmuch as the only questions which we believe the Petitioner is raising for decision by this Court involve the determination of State substantive law and practice, we believe this Court lacks jurisdiction to consider the questions raised. The questions have been dealt with and determined by a final decision in the California Court of Appeals, Second Appellate District. Petitioner quarrels with the correctness of the decision. This Court was not created to review decisions of State Courts on State substantive law and practice. We, therefore, urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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